

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F705280

DAVID DUNAHOO, Employee	CLAIMANT
PILE'S CONCRETE, Employer	RESPONDENT
CNA INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED AUGUST 26, 2009

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 11, 2009, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 18, 2009, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to his lumbar spine at L4-5 on April 10, 2007.
4. The claimant was earning sufficient wages to entitle him to compensation at the maximum rates.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment; specifically, surgery for the L3-4 level.

At the time of the hearing the parties clarified the issue to be litigated. The parties agreed that the respondent has accepted as compensable an injury to the claimant's lumbar spine at the L4-5 level. However, respondent has not accepted liability for a herniated disc at the L3-4 level. Therefore, the issue to be litigated is whether claimant has suffered a compensable injury to the L3-4 level as the result of an incident on April 10, 2007.

The claimant contends that as a result of the incident on April 10, 2007, that he also suffered a compensable injury to the L3-4 level for which he is in need of medical treatment.

The respondents contend that they have accepted liability for an injury to the L4-5 level; however, respondents deny compensability of an injury at the L3-4 level.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 18, 2009, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine at the L3-4 level as a result of the accident on April 10, 2007.

FACTUAL BACKGROUND

_____The claimant is a 43-year-old man who graduated from high school and who has also obtained a bachelor's degree and a master's degree in liberal arts. In addition, claimant has also completed some hours toward a Ph.D program. Claimant testified that he began working for respondent in May 1997 after his first year of college at the University of Arkansas. Other than a two-month period of time, claimant has worked for the respondent since that time. The respondent manufactures concrete septic tanks, grease traps, water storage tanks, and parking curbs. Claimant testified that he was primarily employed by the respondent performing basic labor which included heavy lifting, cutting rebar, and pouring concrete.

The claimant has some history of low back problems which began in July 2002 when he felt a pop in his back while at home. As a result of that injury claimant initially sought medical treatment from Dr. Brownfield and subsequently from Dr. Ball. Claimant was treated conservatively and released to return to work at full duty by Dr. Ball on September 26, 2002.

Claimant testified that on April 3, 2003 he sought medical treatment on one occasion after bending over at work and having some back pain. Claimant did not seek any additional medical treatment until October 25, 2006, when he was evaluated by Dr. Gaston. Claimant reported recurrent back pain and he was treated with medication at that time. Apparently, claimant did not seek any additional medical treatment until after the incident on April 10, 2007.

Claimant testified that on February 26, 2007 he was helping a customer load concrete parking curbs which were approximately six feet long and weighed 220 pounds when he felt something pop in his back. However, claimant testified that he did not seek any medical treatment and that his pain resolved.

On April 10, 2007, claimant was again loading parking curbs in the back of a

customer's truck when he felt a popping sensation in his back. Claimant testified that his back pain has not gone away since that time and his symptoms include pain which radiates into both his left and right legs.

Following the incident, claimant was sent by the respondent to Dr. Vandergriff who evaluated the claimant on April 16, 2007 and diagnosed claimant's condition as a lumbar strain. She prescribed claimant medications, work restrictions, and ordered an MRI scan. In a report dated April 23, 2007, Dr. Vandergriff again recommended an MRI scan and ordered claimant to continue with his work restrictions and in addition she also ordered physical therapy.

An MRI scan was performed on May 7, 2007 which revealed a herniated disc at the L4-5 level. It also revealed disc bulging and a bilateral mild foraminal narrowing at the L2-3 and L3-4 levels.

When conservative treatment did not alleviate claimant's condition, Dr. Vandegriff referred claimant to Dr. Knox. Claimant was initially evaluated by Dr. Knox on June 19, 2007, at which time Dr. Knox indicated that the claimant's MRI scan revealed a large L4-5 disc herniation on the right. Dr. Knox treated claimant with an injection, a lumbar traction program, and physical therapy.

Apparently at some point in time there was some question as to whether or not the respondents were accepting liability for claimant's medical treatment. However, respondents subsequently accepted liability for an injury to the claimant's lumbar spine at the L4-5 level.

In a report dated August 1, 2007, Dr. Knox indicated that claimant's condition was improving and that he was being provided temporary relief with the use of a stimulator. He again recommended that claimant undergo physical therapy and that he would see the claimant on an as-needed basis. The medical records indicate that claimant last received physical therapy in September 2007.

Subsequent to the last physical therapy note in September 2007, the next medical report is dated October 13, 2008. On that date, claimant was evaluated by Amberlyn Naples, a nurse practitioner in Dr. Knox's office. Naples indicated that claimant gave a history of the physical therapy improving his symptoms, but also indicating that the symptoms never subsided. Naples also noted that claimant had a recent onset of symptoms posteriorly down his left lower extremity with no event precipitating the new onset of symptoms. Naples recommended that claimant undergo a new MRI scan and that he be treated with an injection and medications. She also indicated that claimant should be re-evaluated by Dr. Knox.

A second MRI scan was performed on the claimant's lumbar spine in November 2008. This scan revealed a herniated disc at the L3-4 level. Dr. Knox has recommended treatment to include a lumbar traction program and an evaluation by Dr. Ennis for potential injections.

Although respondent has accepted as compensable an injury to the claimant's lumbar spine at the L4-5 level, respondent has not accepted as compensable an injury to the L3-4 level.

ADJUDICATION

_____ Claimant contends that as a result of the accident on April 10, 2007, he suffered an injury to the L3-4 level of his lumbar spine. Claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable injury to the L3-4 level on that date.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proof.

Following claimant's injury on April 10, 2007, Dr. Vandergriff ordered an MRI scan of the claimant's lumbar spine. While that MRI scan did reveal a herniated disc at the L4-5

level, it did not indicate a herniated disc at the L3-4 level. The May 2007 MRI scan did reveal diffuse annular disc bulging, disc desiccation, and central canal stenosis at the L3-4 level. However, Dr. Knox in his deposition testified that these findings are either congenital or degenerative in nature or that they are not necessarily a sign of traumatic injury.

Q. Well, the May 2007 MRI shows diffuse annular disc bulging at L3-4. Is that invariably a sign of traumatic injury?

A. Not necessarily.

Q. Okay. And the May 7, 2007 MRI report states that this gentleman had disc desiccation at L3-4. Is that a sign of - - more likely a sign of degenerative processes or an acute injury, a recent acute injury?

A. More in keeping with the degenerative process.

Q. Okay. And what about central canal stenosis, is that more likely to be a sign of - - is that a degenerative or congenital finding?

A. It could be degenerative, it could be congenital and it could be related to a traumatic incident, I believe.

Q. So we - -

A. Typically whenever you're talking about stenosis, you're talking about bony overgrowth, facet overgrowth which is the bony elements, but I think if there is a component of the stenosis and you get a big central disc bulge from a traumatic incident and it pushes them over the edge, I think that is the component that could be traumatic. But typically what you're talking about, it is more of a degenerative and congenital.

Thus, the findings on the MRI scan in May 2007 are not indicative of a traumatic injury but rather are described by Dr. Knox as not necessarily being indicative of a traumatic injury or that the findings are generally degenerative or congenital in nature.

With respect to this issue, I believe it is important to note that claimant's condition

immediately after the incident in April 2007 was diagnosed as a herniated disc at the L4-5 level and he received treatment for that condition. That treatment consisted of physical therapy which apparently concluded on September 18, 2007. The physical therapist's note of that date indicates under the plan heading that claimant is discharged to a maintenance program.

After claimant's last physical therapy visit on September 18, 2007, the medical records do not indicate that claimant sought any additional medical treatment until he was evaluated by Amberlyn Naples in Dr. Knox's office on October 13, 2008, more than one year later. While claimant indicated to Naples that his back condition had never completely subsided, he also reported new symptoms involving pain radiating down his left leg. As a result, Naples ordered an MRI scan which revealed a herniated disc at the L3-4 level.

In finding that claimant has failed to meet his burden of proof, I am aware that Dr. Knox wrote a report and testified at his deposition that within a reasonable degree of medical certainty the claimant's herniated disc at the L3-4 level is causally related to the incident on April 10, 2007. Although Dr. Knox indicates that his opinion is stated within a reasonable degree of medical certainty, he also admits that his opinion is based upon a "gut feeling" which is speculative.

Q. Okay. And I thought I was understanding you to say earlier when I was asking you questions that we just don't know when the L3-4 disc herniated; is that accurate?

A. Well, we know it was some time between '07 and '08.

Q. We know generally?

A. '07 it didn't look that bad.

Q. Okay.

A. And then it herniated in '08.

Q. All right.

A. But the question is, what precipitated that disc herniation?

Q. Do we know - -

A. It's my gut feeling that it's probably that injury that he had, the original injury of which we spoke.

Q. And how do you arrive at that conclusion?

A. I think I just said it's my gut feeling, so how do you derive from a gut feeling? Is that - -

Q. Well, that's - - Would you agree that's somewhat speculative?

A. Sure.

Thus, Dr. Knox has indicated that his opinion is based upon a gut feeling which is speculative in nature. Speculation and conjecture are not to be substituted for credible evidence by the Commission. *Dena Construction Company v. Herndon*, 264 Ark. 791, 575 S.W. 2d 155 (1979).

Dr. Knox went on to indicate that the problem associated with the herniated disc at L4-5 would have been sufficient in and of itself to cause the symptoms claimant was having at the time of his evaluations in 2007.

In summary, claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lumbar spine at the L3-4 level as a result of the accident on April 10, 2007. An MRI scan taken of the claimant's lumbar spine in May 2007 did not reveal a herniated disc. Claimant was treated for the compensable disc at the L4-5 level and was released from physical therapy as of September 18, 2007. Claimant apparently did not seek any additional medical treatment for his lumbar spine until October 13, more than one year later. At that time, the claimant had a new symptom which included radiation into his left leg. A subsequent MRI scan revealed a herniated disc at the L3-4 level. While Dr. Knox has indicated that it is his belief that a causal

connection exists between the herniated disc at the L3-4 level and the incident on April 10, 2007, Dr. Knox has admitted that his opinion is based upon a gut feeling and speculation. Based upon the foregoing evidence, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that the herniated disc at the L3-4 level is causally related to the accident of April 10, 2007.

Respondent does remain liable for any and all reasonable and necessary medical treatment provided in connection with the claimant's compensable injury at the L4-5 level.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to the L3-4 level on April 10, 2007. Therefore, his claim for compensation benefits relating to L3-4 is hereby denied and dismissed.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$309.10.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE